IN THE

SUPREME COURT OF THE UNITED STATES

OCT 8 19
MICHAEL RODAK, JR.

October Term, 1974

No. 74-393

JERRY D. BRANTLEY, et al.,

Petitioners,

-v.-

UNION BANK & TRUST COMPANY, et al.,

Respondents.

GRANT BAKER, CLINTON GRADY, ESSIE LEE FELTON, et al.,

Petitioners,

-v.-

R. FRANK KEEBLE, Individually, and TOWN FINANCE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CLEVELAND THORNTON
411 East Northside
Tuskegee, AL 36083

JOHN B. CRAWLEY
1018 South B
Troy, AL 36081

JOSEPH J. LEVIN, JR.
PAMELA S. HOROWITZ
MORRIS S. DEES, JR.
119 S. McDonough Street
Montgomery, AL 36101

Attorneys for Petitioners

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	
I. Review by This Court Is Necessary to Settle Important Issues of Federal Law	9
II. The Decision of the Court of Appeals Fails to Apply Properly Existing Principles of State Action and Erroneously Establishes a Different Measure of State Action in Due Process Cases from That Employed in the Context of Equal Protection	13
III. Repossession Pursuant to the Alabama Statutory Scheme Denies Due Process Because There Is No Opportunity for a Hearing Prior to the Final Deprivation of Property	20

Page

Conclusion 21

Appendix

Court of Appeal's Opinion in *Brantley* and *Baker* 1a

Court of Appeal's Opinion in *James v. Pinnix* 4a

District Court's Order in *Baker* 17a

District Court's Order in *Brantley* 25a

Constitutional and Statutory Provisions 26a

Baker Complaint 40a

Brantley Complaint 46a

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3693 (1974) (No. 73-1842) 11, 12, 17, 18

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 13

Fuentes v. Shevin, 407 U.S. 67 (1972) 12, 21

Gonzales v. Automatic Employees Credit Union, 363 F.Supp. 143 (N.D. Ill. 1973), question of jurisdiction postponed to the hearing on the merits, ___ U.S. ___, 94 S.Ct. 1467 (1974) 12

Jackson v. Metropolitan Edison Company, 483 F.2d 754 (3rd Cir. 1973), cert. granted, ___ U.S. ___, 94 S.Ct. 1407 (1974) 12

James v. Pinnix, 495 F.2d 206 (5th Cir. 1974) 2, 9

Lathrop v. Donahue, 367 U.S. 830 (1961) 18

Marsh v. Alabama, 326 U.S. 502 (1946) 18

Page

McCabe v. Atchison, Topeka and Santa Fe R. Co., 235 U.S. 151 (1914) 15

Mitchell v. W. T. Grant Co., ___ U.S. ___, 40 L.Ed.2d 406 (1974) 12, 20, 21

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 15, 16, 17

Nixon v. Condon, 286 U.S. 73 (1932) 15

Public Utilities Commission v. Pollak, 343 U.S. 451 (1952) 18

Railway Employes' Dept. v. Hanson, 351 U.S. 225 (1956) 18

Reitman v. Mulkey, 387 U.S. 369 (1967) 15, 16, 17, 19

Shelley v. Kraemer, 334 U.S. 1 (1948) 14

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 21

United States v. Williams, 341 U.S. 97 (1958) 18

Page

CONSTITUTIONAL PROVISIONS:

U. S. Constitution, Amendment XIV, §1 . . . . . 3, 16

STATUTES:

Uniform Commercial Code, Section 1-105 . . . . . 4, 5

Uniform Commercial Code, Section 9-102 . . . . . 4, 5

Uniform Commercial Code, Section 9-302(1)(d) 4, 14

Uniform Commercial Code, Section 9-403 . . . . . 4, 14

Uniform Commercial Code, Section 9-503 . 4, 7, 8, 9, 10, 14, 16, 19

Uniform Commercial Code, Section 9-504 . . . . 4, 7, 8, 10, 14, 19

United States Code, Title 42, Section 1983 . . . . . 3, 8

OTHER AUTHORITIES:

Johnson, Denial of Self-Help Repossession: An Economic Analysis, 47 S.Cal.L.Rev. 82 (1973) 10

Page

McCall, The Past as Prologue: A History of the Right to Repossess, 47 S.Cal.L.Rev. 58 (1973) 10

McCracken, Mao, & Fricke, Consumer Installment Credit and Public Policy (1965) 10

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No.

JERRY D. BRANTLEY, et al.,

Petitioners,

-v.-

UNION BANK & TRUST COMPANY, et al.,

Respondents.

GRANT BAKER, CLINTON GRADY, ESSIE LEE FELTON, et al.,

Petitioners,

-v.-

R. FRANK KEEBLE, Individually, and TOWN FINANCE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Jerry D. Brantley, Grant Baker, Clinton Grady, Essie Lee Felton, et al., respectfully pray that a writ of certiorari

issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in these cases on August 5, 1974.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals, Nos. 73-3625, 73-3631 (5th Cir., August 5, 1974), is appended to this petition at 1a. The opinion in *James v. Pinnix*, reported at 495 F. 2d 206 (5th Cir. 1974), which the Court of Appeals held dispositive of the cases *sub judice*, is appended at 4a. The order of the United States District Court for the Middle District of Alabama in *Baker v. Keeble*, which is not reported, is appended at 17a. The order of the United States District Court for the Middle District of Alabama in *Brantley v. Union Bank & Trust Company*, which is not reported, is appended at 25a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 5, 1974. This petition for

certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether the summary taking of petitioners' automobiles by respondents, authorized and encouraged by state law, constitutes state action within the Fourteenth Amendment and action under color of state law within 42 U.S.C. §1983.

II. Whether the Alabama statutory repossession scheme violates the due process clause of the Fourteenth Amendment by reason of its failure to provide a hearing prior to the final deprivation of property.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions involved in these cases are set forth in the Appendix beginning at 26a:

(1) U. S. Constitution, Amendment XIV, §1.

(2) Rev. Stat. Sec. 1979, 42 U.S.C. §1983.

(3) Code of Alabama 1940 (Recomp. 1958), Title 7a, §§1-105, 9-102, 9-302(1)(d), 9-403, 9-503, and 9-504.

STATEMENT OF THE CASE

In October of 1972, petitioner Grant Baker, a resident of Macon County, Alabama, obtained a loan of $2,100.00 from respondent Town Finance Corporation in West Point, Georgia, with which to purchase a 1970 Chevelle automobile.[1/] Since Mr. Baker was nineteen years old, petitioners Clinton Grady, a friend, and Essie Lee Felton, an aunt, executed the necessary papers, including a security agreement governed by Code of Alabama 1940 (Recomp. 1958), Title 7A, adopting the Uniform Commercial Code. The agreement gave Town Finance a security interest in

---

1/ Since this case is here from a dismissal for failure to state a claim, the facts presented here are as alleged in the Complaint, the pertinent part of which is appended at 40a.

the Chevelle automobile and in all household possessions of petitioners Grady and Felton.[2] The $2,100.00 check was made payable to petitioner Grady and respondent Keeble, an agent of respondent Town Finance Corporation, who, with

---

2/ The contract contained the following language:

> "Should the undersigned fail to pay any Obligation hereby secured on the interest thereon when the same becomes due, or default . . . the entire indebtedness hereby secured shall at the option of said Company or assigns become immediately due and payable without notice to the undersigned, and the Company or assigns shall then have the remedies of a secured party under the Uniform Commercial Code of Georgia (regardless of whether the Code has been enacted in the jurisdiction where rights or remedies are asserted), including without limitation thereto, the right to take possession of the Collateral . . . " (Emphases supplied.)

Although the provisions are identical anyway, the Code of Alabama and not Georgia governed because the collateral was located in Alabama (see §§1-105 and 9-102), a result foreseen by the parenthetical phrase in the contract.

petitioner Baker, thereupon drove to Phenix City, Alabama, where the Chevelle automobile was located.

After purchasing the Chevelle automobile, which was operated by young Mr. Baker, the petitioners fell behind one month in their payments due to illness. In February of 1973, respondent Town Finance repossessed the automobile by having it picked up by its agent at petitioners' home.

On April 11, 1972, petitioners Brantley purchased a 1970 Pontiac in Troy, Alabama, pursuant to a retail installment contract with the Union Bank in Montgomery.3/ The contract contained

---

3/ Because the *Brantley* case was also dismissed for failure to state a claim, the facts presented here are as alleged in the Complaint, appended at 46a.

default and repossession provisions drafted in conformity with §§9-503 and 9-504.[4/]

After making 5 monthly payments, the Brantleys fell behind in October, 1972, when Mr. Brantley became ill. On December 7, 1972, at 6:30 a.m., a Union Bank agent came to the

---

4/ The contract contained the following language:

> "In the event of a default hereunder, all unpaid installments and indebtedness secured hereby may, at the option of Seller and without demand or notice of any kind be declared, and thereupon immediately shall become due and payable and Seller may enter upon Buyer's premises to take possession of or request Buyer to make the Property available at some convenient place Seller designates to enable Seller to take possession or dispose of the Property and Seller may sell or otherwise dispose of the collateral or any part thereof and exercise from time to time any and all rights and remedies available to it under this agreement and any applicable law." (Emphasis supplied.)

Brantleys' home to take the car, representing to Mrs. Brantley, who was home alone, that his visit carried the sanction of the law. The Bank subsequently sold the automobile and instituted a civil suit to recover a $700.00 deficiency.

Baker and the Brantleys commenced separate suits in the United States District Court for the Middle District of Alabama challenging the constitutionality of §§9-503 and 9-504. Both suits are class actions brought under 42 U.S.C. §1983, invoking jurisdiction pursuant to 28 U.S.C. §1343(3)(4). A full explanatory order of dismissal for failure to state a claim was entered in *Baker* on August 9, 1973. The following day, *Brantley* was dismissed, on the basis of the court's opinion in *Baker*.

The Court of Appeals for the Fifth Circuit consolidated the *Baker* and *Brantley* cases on appeal in an order of January 18, 1974. The court postponed disposition of the appeal

pending its decision in *James v. Pinnix*, a challenge to the constitutionality of §9-503 arising out of the United States District Court for the Southern District of Mississippi. Subsequent to its decision in *James*, the court *sua sponte* placed *Baker* and *Brantley* on its Summary Calendar. On August 5, 1974, the Court of Appeals summarily affirmed the District Court's ruling on the basis of the former's opinion in *James* that the "statutes [were] free from Federal due process scrutiny for lack of requisite state action." (App. p. 3a.)

REASONS FOR GRANTING THE WRIT

I.

REVIEW BY THIS COURT IS NECESSARY TO SETTLE IMPORTANT ISSUES OF FEDERAL LAW.

The Alabama repossession statutes challenged by petitioners are substantially identical to those enacted in virtually every

state.[5/] Their disproportionate effect on the poor,[6/] coupled with the growing concern over consumer rights generally, have spawned attacks

---

5/ McCall, The Past as Prologue: A History of the Right to Repossess, 47 S.Cal. L.Rev. 58, 75 (1973).

6/ One study of repossession ratios of new car credit buyers, categorized by occupation, showed that the repossession ratio of unskilled workers was about seven times that of professional and semi-professional employees. McCracken, Mao, & Fricke, Consumer Installment Credit and Public Policy 129 (1965). While theoretically §§9-503 and 9-504 are available to creditors in all their secured transactions, in practice they are employed most frequently against poor buyers, while problems with more affluent buyers are 'worked out.' As one commentator has noted, "Most credit granters attempt to segregate those accounts that represent a high risk and a low probability of success in obtaining a response from form letters. These accounts are then moved quickly up the scale of intensity of collection effort . . . . Some firms immediately assign some of those accounts to a field representative rather than risk delay in ultimate collection." Johnson, Denial of Self-Help Repossession: An Economic Analysis, 47 S.Cal.L.Rev. 82, 87 (1973).

on their constitutional validity across the nation.7/

The resulting decisions generally have not considered the due process issue because the courts have found no state action. In so doing, the courts have failed to apply properly existing principles of state action. Several, most notably the Circuit Court below, have concluded that the definition of state action in the context of alleged due process violations is different from the definition of state action in conjunction with the equal protection clause. Since this court has never articulated such a 'double standard,' and since the employment of same has far-reaching implications in a wide range of cases, it is imperative that this

---

7/ *See* Petitioners' Brief for Certiorari at 8-9, Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3693 (1974) (No. 73-1842).

Court provide the definitive analysis which the lower courts clearly are seeking.[8/]

In addition, by addressing the due process issue raised by these cases, this Court will have an opportunity to further clarify its decision in *Fuentes v. Shevin*, 407 U.S. 67 (1972), in light of its holding in *Mitchell v. W. T. Grant Co.*, ___ U.S. ___, 40 L.Ed.2d 406 (1974).

8/ Gonzales v. Automatic Employees Credit Union, 363 F.Supp. 143 (N.D. Ill. 1973), question of jurisdiction postponed to the hearing on the merits, ___ U.S. ___, 94 S.Ct. 1467 (1974), does not present the state action issue clearly because appellants' challenge to Illinois' repossession statutes involves complicated procedural questions. *Adams v. Southern California First National Bank*, *supra*, challenging California's repossession statutes, does not squarely address the apparent double standard aspect of the state action question. Jackson v. Metropolitan Edison Company, 483 F.2d 754 (3rd Cir. 1973), cert. granted, U.S. ___, 94 S.Ct. 1407 (1974), deals with state action and due process issues in the context of a publicly regulated utility company's extrajudicial termination of a customer's electrical service. The Court may wish, however, to consolidate the latter two cases with the instant cases.

II.

THE DECISION OF THE COURT OF APPEALS FAILS TO APPLY PROPERLY EXISTING PRINCIPLES OF STATE ACTION AND ERRONEOUSLY ESTABLISHES A DIFFERENT MEASURE OF STATE ACTION IN DUE PROCESS CASES FROM THAT EMPLOYED IN THE CONTEXT OF EQUAL PROTECTION.

We start with the oft-stated principle that "private conduct abridging individual rights does no violation to the [due process clause] unless to some significant extent the State in any of its manifestations has been found to become involved in it." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). This does not mean that ostensibly private conduct is protected from scrutiny. To the contrary, the Court always has adhered to the principle that "only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Supra* at 722.

The "facts and circumstances" in the instant cases reveal the following:

1. Through legislative action Alabama authorizes secured creditors to unilaterally determine default and repossess collateral "without judicial process." §9-503.

2. Secured creditors rely on this authorization in writing in the contracts they present to debtors and orally at the time default occurs.

3. The State controls the means through which a creditor protects his security interest. This is accomplished by filing a financing statement with an officer of the State, for which the State receives a fee. §§9-302(1)(d) and 9-403.

4. The statutory scheme authorizes deficiency judgments as an integral part of repossession. §9-504.

See Shelley v. Kraemer, 334 U.S. 1 (1948).

In *Reitman v. Mulkey*, 387 U.S. 369, 375 (1967), this Court agreed with the lower court's reasoning that "a prohibited state involvement could be found even where the state can be charged with only encouraging, rather than commanding discrimination." This 'encouragement theory' of state action also has been employed in *McCabe v. Atchison, Topeka and Santa Fe R. Co.*, 235 U.S. 151 (1914); *Nixon v. Condon*, 286 U.S. 73 (1932); and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).9/

9/ *Reitman v. Mulkey, supra,* dealt with a state constitutional amendment which forbade the state from interfering in the private sale or rental of residential property. In *McCabe, supra,* the Court was faced with a statute authorizing railroad cars for whites and not blacks. While the case was dismissed on procedural grounds, the Court made it clear that the statute was invalid because the carrier would be "acting in the matter under the authority of state law." (At 162.) Citing the case in *Reitman,* Justice White said, "This was nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action . . . ." (At 379.) *Nixon, supra,* involved a statute which empowered the executive committee of a political party to prescribe the qualifications

The only important distinction between these cases and the cases *sub judice* is that the latter are not race discrimination cases.10/

---

of its members but contained no directive. The Court in *Reitman* said:

"Reposing this power in the executive committee was said to insinuate the State into the self-regulatory, decision-making scheme of the voluntary association; the exercise of the power was viewed as an expression of state authority contrary to the Fourteenth Amendment." (At 379.) In *Moose Lodge, supra,* the Court found state action where a liquor board regulation gave effect to private clubs' racially discriminatory by-laws.

10/ The fact that the statute in *Reitman* allowed what was formerly prohibited, while the right to repossess was recognized at state common law was rejected by the Circuit Court as a meaningful distinction. (App. 14a.) That court also found that the argument that the right flows from the contract does not add to the analysis (*Id.* at 15a.) It should be pointed out, however, that §9-503 allows self-help repossession even when the contract is silent on the point. Therefore, it has altered state common law, and the contract is not the sole source of summary repossession power. Petitioners concede, however, that if the challenged statutes are declared unconstitutional, the right of repossession would still exist under contract. This considerably weakens the contention that a constitutional rule would hamper the credit industry.

In fact, the court below concluded: "Some state involvement in the *Reitman-Moose Lodge* sense may be present here, but it is simply not enough, given the nonracial nature of the case, to constitute state action." (App. 15a.) (Emphasis supplied.) Similarly, the court in *Adams v. Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3693, (1974) (No. 73-1842), said, in discussing *Reitman*, "[W]e are not convinced that the resolution of the state action question involving prejudgment self-help repossession of secured property is controlled by a case involving racial discrimination." (At 333.)

The suggestion that non-race cases are subjected to a stricter state action test is not supported by the decisions of this

---

Petitioners' objective is not to guarantee against injustices but to remove Government's thumb from the scales.

Court.[11/] The Court in *Adams*, presumably in recognition of this fact, attempts to justify its conclusion by saying:

> Although it may be argued that state action is a "jurisdictional" question to be considered separate from substantive matters, the test of balancing facts and weighing circumstances seems to require consideration of the substantive facts. This should not result in a hierachy of rights, or different state action tests for due process and equal protection, but rather should permit independent factual determinations of state action on a case-by-case approach. (n. 23 at 333.) (Emphasis supplied.)

In fact, the result in these cases has been precisely what the *Adams* Court disavows: different state action tests for due process and equal protection. In the instant cases,

---

11/ *See Public Utilities Comm'n. v. Pollak*, 343 U.S. 451 (1952); *United States v. Williams*, 341 U.S. 97 (1958); *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956); *Lathrop v. Donahue*, 367 U.S. 830 (1961), and *Marsh v. Alabama*, 326 U.S. 502 (1946).

the State of Alabama has, by enacting §§9-503 and 9-504, manifestly encouraged summary repossession. The specific reference to the UCC in the *Baker* contract and to "rights and remedies available to it under . . . applicable law" in the *Brantley* contract are ample evidence that in drawing up the agreements respondents were persuaded to include summary repossession by the fact that Alabama statutes so permitted. Further evidence is found in the agent's representation to Mrs. Brantley that his imminent act of repossession carried the sanction of law. The State has further involved itself by setting up a filing system by which to protect the creditor's security interest. These are the "independent factual determinations" that have to be made, and they clearly indicate that, under *Reitman* and its line of cases, the state has sufficiently involved itself to raise a federal question. To hold otherwise is to establish a questionable rule that a federal court,

while opening its doors to alleged violations of equal protection, may close them with respect to due process claims.

III.

REPOSSESSION PURSUANT TO THE ALABAMA STATUTORY SCHEME DENIES DUE PROCESS BECAUSE THERE IS NO OPPORTUNITY FOR A HEARING PRIOR TO THE FINAL DEPRIVATION OF PROPERTY.

The Alabama statutory scheme challenged herein allows the creditor to repossess and dispose of the debtor's property without any opportunity for a hearing. This is a far cry from the "constitutional accommodation of the respective interests of buyer and seller" which the Court found characterized the Louisiana sequestration procedure upheld in *Mitchell v. W. T. Grant Co.*, ___ U.S. ___, 40 L.Ed2d 406, 415 (1974). To the contrary, the challenged statutes unconstitutionally ignore the interests of the buyer in favor of the seller.

The Court in *Mitchell*, referring to "a long line of cases in this Court, culminating in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and *Fuentes v. Shevin*, 407 U.S. 67 (1972)," said: "[T]hey stand for the proposition that a hearing must be had before one is finally deprived of his property . . . ." (At 415-6.)

Petitioners having been finally deprived of their property without an opportunity to be heard clearly were denied due process.

CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

JOSEPH J. LEVIN, JR.
PAMELA S. HOROWITZ
MORRIS S. DEES, JR.

119 South McDonough Street
Montgomery, Alabama 36101

CLEVELAND THORNTON
411 East Northside
Tuskegee, AL 36083

JOHN B. CRAWLEY
1018 South B
Troy, AL 36081

Attorneys for Petitioners

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 73-3625, 73-3631
Summary Calendar.

JERRY D. BRANTLEY, ET AL.,
Plaintiffs-Appellants,

v.

UNION BANK & TRUST COMPANY, ET AL.,
Defendants-Appellees.

GRANT BAKER, CLINTON GRADY AND
ESSIE LEE FELTON, ETC.,
Plaintiffs-Appellants,

v.

R. FRANK KEEBLE, INDIVIDUALLY, AND
TOWN FINANCE CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

August 5, 1974.

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit Judges.

PER CURIAM:

The appellants in this case seek to challenge the constitutionality of §§9-503, 9-504, Title 7A of the Alabama Code (§§9-503, 9-504 of the Uniform Commercial Code) on due process grounds.1/ These statutes permit limited peaceful self-help repossession without prior notice or hearing by a private party under authority of a private agreement.

1/ Sections 9-503 and 9-504 read in pertinent part:

> §9-503. *Secured party's right to take possession after default.* - Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.
>
> §9-504. *Secured party's right to dispose of collateral after default; effect of disposition.* - (1) A secured party after default may sell, lease or otherwise dispose of any and all of the collateral in its then condition or following any commercially reasonable preparation or processing.

Our decision in this case is squarely controlled by our recent decision in James v. Pinnix, 495 F.2d 206, p.207, n.5a [1974] in which we found such statutes to be free from Federal due process scrutiny for a lack of requisite state action. The judgments of the district court dismissing the appellants' complaints were correct.

Affirmed.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-1866.

Jessie JAMES, suing in his own behalf and on behalf of all others similarly situated,
Plaintiff-Appellee,

v.

James PINNIX, d/b/a Pinnix Used Cars, individually and as representative of all others similarly situated,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi, at Jackson

---

June 10, 1974.

Before BROWN, Chief Judge, and GODBOLD and CLARK, Circuit Judges.

GODBOLD, Circuit Judge:

Jessie James, the appellee, bought a used Ford sedan from the appellant, James Pinnix,

for $495. He paid $200 down[1] and signed a contract in which he agreed to pay off the balance at $15 per week. The contract provided that upon default by appellee the appellant could take possession of the car and sell it with or without notice. Appellee eventually stopped making payments,[2] and at the end of about a half-year the appellant repossessed the car via "self-help," towing it away from in front of appellee's house[3] without

---

1/ $150 in cash and $50 in the form of a traded-in 1962 Chevrolet.

2/ Appellee claimed he had experienced difficulties with the car and that appellant, upon being informed of them, had told him to make no more payments. Appellant denied having been told about any difficulties. Because of the view the District Court took of the legal issues, this factual dispute and several other factual matters were not resolved below.

3/ Appellant in an affidavit stated that when he located the car in front of appellee's house, it was missing two wheels and its battery.

first initiating suit or otherwise invoking official processes, and without affording appellee preseizure notice[4/] or opportunity to be heard. Appellee then brought suit, alleging a 42 U.S.C. §1983 cause of action and 28 U.S.C. §1343(3) jurisdiction. The District Court permitted the suit to go forward as a class action,[5/] ordered the car returned to

---

4/ Appellant's affidavit stated that he knocked on appellee's door just before effecting the repossession, but that no one answered although noise and music were coming from inside the house.

5/ Appellee's class was composed of all residents of the State of Mississippi whose property may in the future be seized by a secured creditor under a security agreement, without use of judicial process and without the consent of the owner of the property, without prior notice and without affording the opportunity for a judicial pre-seizure hearing to determine possessory rights to the property. The appellant's class was composed of all creditors who hold security interests in personal property situated in the State of Mississippi and owned by individuals residing in the State of Mississippi.

appellee, and enjoined appellant from taking the car again without affording appellee prior notice and an opportunity for preseizure hearing, absent a knowing and intelligent waiver by appellee of his possessory rights. Also, the court declared Mississippi Code 1972 Ann. §75-9-503[5a/] (§9-503 of the Uniform Commercial Code) void and unenforceable insofar as it authorizes summary seizure. Finally, the court enjoined appellant and the members of his class from further summary seizures.

On this appeal appellant urges that since repossession of collateral by self-help does not involve state action, appellee has failed

---

5a/ Section 75-9-503 reads in relevant part:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

to state a claim under 42 U.S.C. §1983. Like the two circuit courts that have already considered the matter,[6/] we hold that there was no state action and therefore reverse.

Appellee has no federal right to redress for appellant's interference with his property interests unless that interference involved state action. To support the existence of state action appellee urges the applicability of the leading case of Hall v. Garson, 430 F.2d 430 (CA5, 1970), in which this circuit found state action in the behavior of a Texas landlady who entered a tenant's apartment without giving notice or resorting to official processes and seized goods to satisfy the tenant's past due rent liability. In *Hall* we held that

> the action taken, the entry into another's home and the seizure of

---

6/ Adams v. Southern California First National Bank, 492 F.2d 324 (CA9, 1973); Bichel Optical Laboratories v. Marquette National Bank, 487 F.2d 906 (CA8, 1974).

> another's property, was an act that possesses many, if not all, of the characteristics of an act of the State. The execution of a lien, whether a traditional security interest or a quasi writ of attachment or judgment lien has in Texas traditionally been the function of the Sheriff or constable. Thus [the challenged lien statute under whose aegis the landlady had acted] vests in the landlord and his agents authority that is normally exercised by the state and historically has been a state function.

430 F.2d at 439 (footnote omitted). The *Hall* state function concept does not carry over to the present case with sufficient force to compel a finding of state action. In *Hall* the landlady seized goods to satisfy a debt arising out of an agreement having nothing to do with the goods. Such a taking closely resembles a

seizure in satisfaction of a judgment - a function traditionally performed by a sheriff or other state agent. In the present case, by contrast, the appellant-creditor possessed and claimed no roving commission to extract appellee's goods to satisfy a separate debt. Rather, he had a specific purchase money security interest in a particular item, and he seized only that item. His action, moreover, was by long Mississippi tradition the sort of action performed by private persons, not state officials. *See* Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938). Finally, seizure by entry into a dwelling, in *Hall* a major decisional factor because it was deemed an indicium of state-like behavior, was absent from the instant case.

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), does not compel a holding of state action. There the Supreme Court rejected the argument that the

Pennsylvania Liquor Control Board's pervasive regulation of a liquor-licensed private club amounted to such significant state involvement as to make the club's racially discriminatory guest policy state action.7/ The Court also held, however, that application of a liquor board regulation requiring all clubs to adhere to their own constitutions and by-laws would result in invoking the sanctions of the state to enforce discriminatory rules in those instances where the private provisions required racial discrimination, and that therefore the regulation was enjoinable.

7/ Based on this facet of *Moose Lodge*, we reject appellee's argument that the pervasive state regulation of credit transactions - as shown by Miss. Code 1972 Ann. §§75-9-502 to 75-9-507, 63-19-31 (regulating the details of installment sales contracts), etc. - makes self-help repossession state action. See *Adams*, *supra*, 492 F.2d at 334.

Appellee suggests that §9-503 overtly encourages private interference by secured creditors with property interests in a manner analogous to the operation of the offending liquor board regulation. The analogy has some validity. One can erect an argument that §9-503 backs up creditors in enforcing contracts providing for procedureless interferences with property interests just as the regulation in *Moose Lodge* backed up and gave effect to private clubs' racially discriminatory by-laws. We cannot avoid the force of the analogy by labelling §9-503 "neutral" or by stating that it does not "encourage" creditors to interfere with debtors' property.[8/] Nevertheless, *Moose Lodge* is still distinguishable, because it involved racial discrimination, behavior that since Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686

8/ See Kirksey v. Thelig, 351 F.Supp. 727, 731 & nn. 7-8 (D.Colo. 1972).

98 L.Ed. 873 (1954), courts have come to look upon as very nearly *malum in se*. The outer boundaries of "imputed" state action have been charted primarily in race discrimination cases. We are unwilling to push out the frontiers still farther in a case devoid of racial overtones.9/

The same consideration compels us to reject appellee's argument based on Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1966). There again racial discrimination was involved. Moreover, the indicia of state involvement were much stronger, because, as the opinion made clear, the purpose of the challenged state constitutional amendment was to authorize private discrimination in the transfer of real property where before it had been barred by statute.

9/ See Oller v. Bank of America, 342 F.Supp. 21, 23 (N.D.Cal. 1972).

A number of courts in §9-503 cases have rejected debtors' *Reitman* contentions by holding that the UCC did not "create the right" to repossess via self-help, that the right flows exclusively from contract and was recognized at state common law. We prefer not to follow that line of analysis-by-characterization. See Judge Byrne's dissent in *Adams*, 492 F.2d at 338. Were we to follow it, the answer it would yield when applied to Mississippi law would be uncertain. There is a reasonable, albeit conceptual, argument that the Mississippi legislature intended Article 9 of the UCC to supplant preexisting law and that therefore the power to repossess flows from §9-503 today even though it was recognized in pre-UCC Mississippi common law. Even setting that argument to one side, the fact is that Mississippi cases did not sanction self-help repossession except when provided for in the parties' contract, whereas §9-503 allows it even when the contract is

silent on the point.[10] Thus the creditor's arguments that §9-503 merely carried forward the former Mississippi practice and that the contract is the sole source of summary repossession power, lose some force.[11]

No bright lines can be drawn in this area, and we draw none. Some state involvement in the *Reitman-Moose Lodge* sense may be present here, but it is simply not enough, given the nonracial nature of the case, to constitute state action. *See* Kirksey v. Thelig, *supra*, at 732-733.

We reject appellee's contention that Mississippi creditors are joint participants with the state under United States v. Price,

---

[10] But not when the contract expressly forbids it. Section 9-503 reads, "Unless otherwise agreed," self-help is permitted.

[11] The class of debtors defined in the order of the District Court conceivably could include persons whose goods were summarily seized even though the contracts they signed contained no clause authorizing such action.

383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966). Nor is Peterson v. City of Greenville, 373 U.S. 244, 83 S.Ct. 1119, 10 L.Ed.2d 323 (1963), apposite. There a store manager's action in asking ten black youngsters to leave the "whites-only" area of a restaurant and in calling upon the police to speed their departure became state action, because the state had "commanded a particular result," had "become involved" in it, and had "removed [the] decision [whether or not to maintain segregated facilities] from the sphere of private choice." 373 U.S. at 248, 83 S.Ct. at 1121, 10 L.Ed.2d at 326. *Peterson* obviously involved racial discrimination and turned upon the existence of a city ordinance requiring segregation in restaurants. Whatever else it may do, §9-503 assuredly does not *require* creditors to contract for or to exercise the power of summary repossession.

Reversed.

IN THE

UNITED STATES DISTRICT COURT FOR

THE MIDDLE DISTRICT OF ALABAMA

EASTERN DIVISION

GRANT BAKER AND CLINTON GRADY, Individually and on behalf of all others the same or similarly situated,	)	
Plaintiffs,	)	
VS.	)	CIVIL ACTION NO. 998-E
R. FRANK KEEBLE, Individually, and TOWN FINANCE CORPORATION, a Corporation,	)	
Defendants.	)	

O R D E R

The cause is submitted for final judgment on the complaint, answer, exhibits, stipulations and briefs in the record.

Plaintiff, Clinton Grady, financed the purchase of an automobile with the Defendant, Town Finance Corporation. Mr. Grady signed a

form contract which contained a security agreement and Plaintiff, Essie Lee Grady (Felton) was a co-maker, listing her furniture as additional security. The evidence shows that the car was actually used, purchased and partially paid for by Plaintiff, Grant Baker, and that Grady and Felton merely assisted Baker in obtaining the necessary financing. The Defendant, R. Frank Keeble, allegedly was the agent of Town Finance Corporation. The Plaintiffs fell behind in their payments, and the car was repossessed by Town Finance Corporation, said repossession being authorized by the security agreement.

The claims for relief are based on several theories of law: (1) That Code of Alabama, Title 7A, §§9-503 and 9-504 are unconstitutional on their face; (2) that the security agreement is unconstitutional; (3) fraud in the

procurement of the agreement; and (4) that the agreement is usurious.1/

Although the complaint contains several causes of action, it appears that the parties have concentrated most, if not all, of their time on the constitutional issue surrounding §9-503. The briefs and evidence are aimed toward this issue, with apparently little regard for the other issues. Therefore, the Court at this time addresses itself only to the constitutional issue of §§9-503 and 9-504.

The Plaintiffs have brought a §1983 class action seeking to enjoin the enforcement of Alabama's "self-help" repossession statute, Code of Alabama, Title 7A, §§9-503 and 9-504.

1/ The latter three theories relate to causes cognizable under the state law. Federal jurisdiction, if any, must rise or fall on the constitutional issue. Jurisdictional amount for diversity jurisdiction is obviously lacking. Jurisdiction is alleged only on the basis of 28 USC §§1343(3), (4) and 1332.

This suit can be broken into two distinct issues: (1) Does private repossession under the auspices of §9-503 constitute action under "color of state law" giving rise to §1983 federal jurisdiction; and (2) if "state action" is present, does the remedy endorsed by §9-503 violate due process? A negative answer to the first question obviates the necessity of answering the second.

Upon consideration of this cause, this Court is of the opinion that the arguments against state action are compelling and that this case should be dismissed for lack of jurisdiction. Of the existing district court decisions involving attacks on the constitutionality of §9-503, four reached the conclusion that Plaintiffs failed to establish §1983 federal jurisdiction because the repossessing creditors were not acting under "color of state law". *Kirksey v. Theilig*, 351 F.Supp. 727 (DC Colo. 1972); *Greene v. The First National Exchange Bank of Virginia*, 348 F.Supp. 672 (WD VA. 1972); *Oller*

v. Bank of America, 342 F.Supp. 21 (ND Cal. 1972); *McCormick v. First National Bank of Miami*, 322 F.Supp. 604 (SD Fla. 1971). *Adams v. Egley*, 338 F.Supp. 614 (SD Cal. 1972), and *Michel v. Rex-Noreco*, ___ F.Supp. ___, Civil Action 6729 (DC Vermont 1972), are the lone exceptions. Apparently, the question was not raised in *James v. Pennix*, [sic] (S.D.Miss. 1973) Ci. No. 72 J-250-N, wherein the court held a Mississippi statute unconstitutional under the particular circumstances.

As a general rule, action by a non-state official fulfills the requirement of "state action" in only three circumstances: (1) Where a state official is acting in concert with a private individual[2/]; (2) where the state compels such action; and (3) where the state law

---

2/ This is the distinguishing feature between the present case and *Adickes v. S.H. Kress Co.*, 398 U.S. 144, upon which Plaintiffs rely.

creates a power which has no common law or contractual origin[3/]. None of the above three exceptions includes "self-help" repossession. See *Oller v. Bank of America*, supra.

Plaintiffs urge this Court to extend the *Reitman* theory of state action to repossessions under §9-503. However, several factors militate against such an extension of the *Reitman* theory. The *Reitman* case dealt with racial discrimination and an attempt to circumvent pre-existing law. This is not the situation in the case sub judice. The statute under attack does not invoke racial discrimination nor does the statute change the pre-existing law. Self-help repossession has long been recognized as a valid remedy, and §9-503 merely codified pre-existing law. The Plaintiffs' theory of state action would subject most private conduct to

---

3/ This is the distinguishing feature between the present case and the cases of Hall v. Carson, 430 F.2d 430 (5 Cir. 1970), *Reitman v. Mulkey*, 387 U.S. 369 (1967).

Fourteenth Amendment standards. See *Kirksey v. Theilig*, supra.

Furthermore, the trend of recent Supreme Court decisions has been to restrict the "state action" concept rather than to expand said concept. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163.

In summary, self-help repossession has long been recognized as a valid private remedy and §9-503 is not a sudden intervention. Under the weight of authority, as well as the trend of recent Supreme Court decisions, this Court is of the opinion that no "state action" within the meaning of §1983 is involved in a §9-503 repossession to invoke §1983 jurisdiction. Accordingly, all aspects of this proceeding should be, and the same are hereby ORDERED, dismissed for lack of federal jurisdiction. It is further

ORDERED that the costs of this proceeding be, and the same are hereby, taxed against the Plaintiffs for which execution may issue.

DONE this 9th day of August, 1973.

s/ R. E. Varner
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JERRY D. BRANTLEY, ET AL.,	)	
Plaintiffs,	)	
VS.	)	CIVIL ACTION NO. 4007-N
UNION BANK & TRUST COMPANY, A Corporation; ET AL.,	)	
Defendants	)	

O R D E R

It is the ORDER, JUDGMENT and DECREE of this Court that this cause be, and the same is hereby, dismissed because this Court lacks jurisdiction. See *Baker v. Keeble*, Civil Action No. 998-E (M.D. Ala. 1973).

DONE this 10th day of August, 1973.

s/ R. E. Varner
UNITED STATES DISTRICT JUDGE

U. S. CONSTITUTION, AMENDMENT XIV.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REVISED STATUTES SECTION 1979.

UNITED STATES CODE.

Title 42.

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

ALABAMA COMMERCIAL CODE.

§1-105. Territorial application of the act; parties' power to choose applicable law. -

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this title applies to transactions bearing an appropriate relation to this state.

(2) Where one of the following provisions of this title specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. Section 2-402.

Applicability of the article on bank deposits and collections. Section 4-102.

Bulk transfers subject to the article on bulk transfers. Section 6-102.

Applicability of the article on investment securities. Section 8-106.

Policy and scope of the article on secured transactions. Sections 9-102 and 9-103.

§9-102. Policy and scope of article. -

(1) Except as otherwise provided in Section 9-103 on multiple state transactions and in section 9-104 on excluded transactions, this article applies so far as concerns any personal property and fixtures within the jurisdiction of this state

(a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general

intangibles, chattel paper, accounts or contract rights; and also

(b) to any sale of accounts, contract rights or chattel paper.

(2) This article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This article does not apply to statutory liens except as provided in section 9-310.

(3) The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply.

§9-302. When filing is required to perfect security interest; security interests to which

filing provisions of this article do not apply.-

(1) A financing statement must be filed to perfect all security interests except the following:

(d) a purchase money security interest in consumer goods; but filing is required for a fixture under section 9-313 or for a motor vehicle required to be licensed;

§9-403. What constitutes filing; duration of filing; effect of lapsed filing; duties of filing officer.-

(1) Presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under this article.

(2) A filed financing statement which states a maturity date of the obligation secured of five years or less is effective until such maturity date and thereafter for a period of sixty days. Any other filed financing

statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of such sixty day period after a stated maturity date or on the expiration of such five year period, as the case may be, unless a continuation statement is filed prior to the lapse. Upon such lapse the security which states that the obligation secured is payable on demand is effective for five years from the date of filing.

(3) A continuation statement may be filed by the secured party (i) within six months before and sixty days after a stated maturity date of five years or less, and (ii) otherwise within six months prior to the expiration of the five year period specified in subsection (2). Any such continuation statement must be signed by the secured party, identify the original statement by file number and state that the original statement is still effective. Upon

timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in subsection (2) unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement. Unless a statute on disposition of public records provides otherwise, the filing officer may remove a lapsed statement from the files and destroy it.

(4) A filing officer shall mark each statement with a consecutive file number and with the date and hour of filing and shall hold the statement for public inspection. In addition the filing officer shall index the statements according to the name of the debtor and shall note in the index the file number and the address of the debtor given in the

statement. In addition to the indexing required in the preceding sentence, statements covering crops growing or to be grown, or goods which are or are to become fixtures, or timber shall be indexed in the real estate mortgage records by the filing officer according to the name of the record owner given in the statement.

(5) The uniform fee for filing, indexing and furnishing filing data for an original or a continuation statement shall be $2.00.

§9-503. Secured party's right to take possession after default.-

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the

collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under section 9-504.

§9-504. Secured party's right to dispose of collateral after default; effect of disposition.-

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the article on sales (article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale, selling and the

like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any

deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of

consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

(Eastern Division)

GRANT BAKER And CLINTON GRADY, Individually and on behalf of all others the same or similarly situated,	)	
Plaintiffs,	)	
VS.	)	CIVIL ACTION NO. 998-E
R. FRANK KEEBLE, Individually And TOWN FINANCE CORPORATION, a Corporation,	)	
Defendants.	)	

C O M P L A I N T

V

Allegations of Fact

a. On or about to-wit: October 13, 1972, Plaintiffs went to West Point, Georgia to borrow money from Defendant, Town Finance Corporation in order to purchase one 1970 Chevelle Automobile, Serial # 136370A172157.

b. Prior to this date, Plaintiffs had negotiated with one David E. Crawford to purchase said automobile for a price of Two Thousand One Hundred ($2,100.00) Dollars.

c. While attempting to obtain the necessary $2,100.00 from Town Finance Corporation, Defendant, R. Frank Keeble became involved in the transaction. He was represented to be an agent, servant or employee of Defendant, Town Finance Corporation.

d. Plaintiff Clinton Grady signed various papers in order to obtain the loan. Upon request of Defendant Town Finance Corporation, the aunt of Defendant Grant Baker co-signed various papers with Plaintiff Clinton Grady. Her name is Essie Lee Felton. However, at the instruction of Defendant Town Finance Corporation, she signed as "Essie Lee Grady".

e. After signing all the papers in order to obtain the $2,100.00 Plaintiffs found themselves owing a total of $2,832.00. See Federal

Disclosure Statement which is attached hereto and made a part hereof as Plaintiffs' Exhibit One. [Omitted.] A copy of the Security Agreement is attached hereto and made a part hereof as Plaintiffs' Exhibit Two. [Omitted.]

f. A check in the amount of $2,100.00 was then made by Defendant Town Finance Corporation. The check was made payable to Defendant, R. Frank Keeble and Plaintiff Clinton Grady.

g. Both Defendant Keeble and Plaintiff Grady endorsed the check. Plaintiff Grady endorsed upon the insistence and instructions of Keeble.

h. Keeble then took the check and cashed it. He gave Plaintiff Grady $1,640.00 and kept the remaining $460.00. He informed both Plaintiffs that if they wanted to get the $460.00 in order to have enough to purchase the 1970 Chevelle automobile they would have to give Keeble Plaintiff Baker's 1966 Nova. Both Plaintiffs reluctantly agreed and said car was given to Keeble.

i. Thereupon, Plaintiffs Baker and Grady and Defendant Keeble drove to Phenix City, Russell County, Alabama, to the place where the 1970 Chevelle automobile was located. Keeble counted out the money to David E. Crawford and Keeble took possession of the car.

j. Upon information and belief, Plaintiffs allege that Defendant Keeble took title to said 1970 Chevelle automobile.

k. Keeble then turned the car over to Plaintiffs. However, upon information and belief, Plaintiff alleges that Keeble retained title to said automobile.

l. Plaintiff Baker operated said automobile and made the payments on same. However, he became sick and became behind one payment. He had made said payments to Defendant Keeble.

m. On or about to-wit: February 19, 1973, Frederick D. Jones, an agent, servant or employee of Defendant, Town Finance Corporation, did come to the residence of Plaintiff in Macon County,

Alabama and took possession and repossessed the said 1970 Chevelle Automobile. He did so under the pretext that Plaintiffs had not obtained the proper insurance for the said 1970 Chevelle Automobile.

n. Plaintiffs' attorney was informed that Defendant intends to sell said 1970 Chevelle Automobile.

o. Plaintiffs are informed, and believe and upon such information and belief allege that the repossession by Defendant, Town Finance Corporation and Frederick D. Jones was pursuant to Title 7A, Section 9-503 of the Code of Alabama. Said Plaintiffs are informed and believe and upon such information and belief allege that said Defendant intends to sell said automobile pursuant to Title 7A, Section 9-504 of the Alabama Code.

p. However, if Plaintiffs are mistaken concerning what law said Defendant Town Finance Corporation intends to sell said 1970 Chevelle

automobile and the law is in fact the law of the State of Georgia, then Plaintiffs allege that the corresponding provisions of the Uniform Commercial Code Section 9-504, which Georgia has adopted, is the statute under which said Defendant intends to sell said automobile.

q. Title 7A, Sections 9-503 and 9-504 of the Code of Alabama read as follows: [Omitted.]

Clellon Baeder
Lee County Legal
Service Program
186 N. Gay Street
Auburn, AL 36830

GRAY, SEAY & LANGFORD

BY: s/ Cleveland Thornton
Attorneys for Plaintiffs
Post Office Box 239
Tuskegee, Alabama 36083

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

(NORTHERN DIVISION)

JERRY D. BRANTLEY AND JEAN A. BRANTLEY, PLAINTIFFS,	)	
VS.	)	CIVIL ACTION NO. [4007-N]
UNION BANK & TRUST COMPANY, a Corporation; DOUG GOODWIN, Individually; and LANGFORD INVESTIGATORS, INC., a Corporation, DEFENDANTS.	)	

COMPLAINT

V. FACTS

a. On to-wit: April 11, 1972, Plaintiffs, Jerry D. Brantley and Jean A. Brantley, who are husband and wife, went to Mary Chevrolet Company in Troy, Alabama, and purchased a 1970 Pontiac automobile. See the Bill of Sale which is attached hereto and made a part hereof as

Plaintiffs' Exhibit #One. [Omitted.] Plaintiffs were never given the original copy of the Bill of Sale.

b. The sales price, including taxes and finance and other charges was $4,131.57. Plaintiffs were given a used car allowance on a 1968 Oldsmobile of $723.45 with a resulting balance owing Defendant, Union Bank & Trust Company, of $4,131.57 payable in 36 monthly installments of $94.67. The 1968 Oldsmobile given in trade was left with Mary Chevrolet Company when the transaction was completed.

c. In order to obtain a loan to finance the purchase of the automobile, Plaintiffs signed a retail installment contract which was a promise to pay to Defendant, Union Bank & Trust Company, the full sum of $4,131.57. See the retail installment contract which is attached hereto and made a part hereof as Plaintiffs' Exhibit #Two. [Omitted.]

d. The entire transaction, including

signing the retail installment contract, occured on the premises of Mary Chevrolet Company in Troy. At the conclusion of the transaction, Plaintiffs, Jerry D. Brantley and Jean A. Brantley, were given possession of the 1970 Pontiac automobile.

e. Upon information and belief, Plaintiffs allege that Mary Chevrolet Company then transferred the retail installment contract to defendant, Union Bank & Trust Company.

f. Plaintiffs began operating said automobile on to-wit: April 11, 1972. Plaintiff, Jerry D. Brantley, primarily used the automobile to engage in gainfull employment in the Atlanta, Georgia, area. The automobile was also used by Plaintiff, Jean A. Brantley, to engage in gainfull employment in the Troy area.

g. The payments to defendant, Union Bank & Trust Company, were to begin on May 26, 1972, and on the 26th day of each month thereafter. Plaintiffs made the following payments in the amount of $94.67 each:

Date Payment Mailed in 1972:	Payment for Month of:
May 30	May
June 26	June
August 10	July
October 8	August
November 10	September

h. The automobile was repossessed on December 7, 1972, with the payments due for October 26, 1972, and November 26, 1972.

i. Plaintiffs became unable to make the monthly payments on time when Plaintiff, Jerry D. Brantley, became sick for a period of three months during which time he was confined to his bed for a period of six weeks. During and after the period when Plaintiff, Jerry D. Brantley, was sick, Defendant, Union Bank & Trust Company, through its employees contacted Plaintiffs about payments on the automobile. Arrangements for payments were made each time Plaintiffs were contacted and Plaintiffs were able to make the payments as agreed.

j. On to wit: Tuesday, December 5, 1972, a person who stated he worked for Defendant, Union Bank & Trust Company, called Plaintiffs' home and talked to Jean A. Brantley. The purpose of the call was to talk with Plaintiff, Jerry D. Brantley, about a payment. Jean A. Brantley told the caller that Jerry D. Brantley was working in Atlanta and she expected him home on the weekend. She told the caller that she would have Jerry return the call or come to the Bank as soon as he got home. The caller stated that this would be "o k".

k. Two days later on to-wit: Thursday, December 7, 1972, before 6:30 A.M. Defendant, Doug Goodwin, knocked at the front door of Plaintiffs' home. He identified himself as an employee of Langford Investigators and told Mrs. Brantley that he had come to "pick up the car". Mr. Goodwin talked with Mrs. Brantley about one hour during which time he told her that his orders were to pick up the car; that he could get

"legal papers" to obtain the car, but that it was "costing her by the hour" for him to wait for her to consent to pick up the car; that it would cost her about $80.00 more for him to "go through Court" to get the car, that "the only thing I can do is take the car, I have been sent here to take the car".

Mrs. Brantley tried to contact Mr. Brantley in Atlanta, but was unable to do so because he had begun work about 3:00 A.M. as a deliveryman on a milk route. After failing to contact Mr. Brantley, she began to cry and stated, "there's nothing else to do, but give it to you" and Mr. Goodwin stated in response, "that's it, you will have to give it to me". She then gave him the keys and he assisted her in removing personal belongings from the car. Mr. Goodwin then drove the car off.

1. Since losing the automobile, Plaintiff, Jerry D. Brantley has had difficulty in obtaining employment because he had no automobile.

m. Plaintiffs were notified on to-wit: February 28, 1973, by Scott Athey an employee of Defendant, Union Bank & Trust Company, that the automobile had been sold and that Plaintiffs owed the Bank about $700.00. On March 7, 1973, a civil suit was commenced in the Inferior Court of Pike County by Defendant, Union Bank & Trust Company, claiming $700.13 as a balance due on the retail installment contract. Plaintiffs have had to employ Attorney John B. Crawley to represent them in defense of this suit which Plaintiffs claim as damages.

s/ John B. Crawley
John B. Crawley
Attorney for Plaintiffs
1018 South Brundidge Street
Troy, Alabama 36081

No. 74-393

NOV 2 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

JERRY D. BRANTLEY, ET AL.,
PETITIONERS,

v.

UNION BANK & TRUST COMPANY, ET AL.,
RESPONDENTS,

GRANT BAKER, CLINTON GRADY,
ESSIE LEE FELTON, ET AL.,
PETITIONERS,

v.

R. FRANK KEEBLE, INDIVIDUALLY,
AND TOWN FINANCE CORPORATION
RESPONDENTS,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT UNION BANK AND TRUST COMPANY IN OPPOSITION

JAMES J. CARTER
JOHN M. MILLING, JR.
Second Floor Hill Building
P. O. Box 116
Montgomery, Alabama 36101

CHARLES P. MILLER
Union Bank Building
Montgomery, Alabama 36101

Attorneys for Respondent
Union Bank & Trust Company

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of Case	2, 3, 4
Argument	
I. The decision below is clearly correct	5, 6
II. There is no conflict of decision and the question of law is settled	7, 8, 9
Conclusion	10
Appendix	1a, 2a

TABLE OF AUTHORITIES

Cases: Page

Adams vs. Southern California First National Bank (9th Cir., 1973) 492 F.2d 324 7

Baker, et al., vs. R. Frank Keeble, (5th Cir., August 5, 1974) 498 F.2d 365 ..... 1, 4, 8, 9

Brantley, et al, vs. Union Bank and Trust Company, (5th Cir., August 5, 1974) 498 F.2d 365 ..... 1, 4, 8, 9

Bichel Optical Laboratories, Inc. vs. Marquette National Bank (8th Cir., 1973) 487 F.2d 906 7

Gibbs vs. Titleman, Nos. 74-1062 to 74-1067 .....F.2d..... (3rd Cir., filed August 1, 1974) 7

James et al., vs Pinnix, et al., (5th Cir., June 10, 1974) 495 F.2d 206 ..... 1, 4, 8, 9

Moose Lodge No. 107 vs. Irvis (1972) 407 U. S. 163 ..... 5, 8, 9

Nowlin vs. Professional Auto Sales, Inc., No. 73-1348 .....F.2d..... (8th Cir., filed April 25, 1974 7

Oller vs. Bank of America, (N. D. Cal., 1972) 342 F. Supp. 21, 23 8

Reitman vs. Mulkey, (1967) 387 U. S. 369 ..... 5, 7, 8, 9

Shelley vs. Kraemer, (1948) 334 U. S. 1 ..... 5, 8

Shirley vs. State National Bank of Connecticut No. 73-1783 .....F.2d..... (2d Cir., filed February 14, 1974) 7

Turner vs. Impala Motors, No. 73-1826 .....F.2d..... (6th Cir., filed September 20, 1974 7

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-393

JERRY D. BRANTLEY, ET AL.,

PETITIONERS,

v.

UNION BANK & TRUST COMPANY, ET AL.,

RESPONDENTS,

GRANT BAKER, CLINTON GRADY,
ESSIE LEE FELTON, ET AL.,

PETITIONERS,

v.

R. FRANK KEEBLE, INDIVIDUALLY,
AND TOWN FINANCE CORPORATION

RESPONDENTS,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT UNION BANK AND TRUST COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit in *Jerry D. Brantley, et al., vs. Union Bank and Trust Company,* No. 73-3625, and *Grant Baker, et al., vs. R. Frank Keeble,* No. 73-3631, is reported at 498 F.2d 365 (5th Cir. August 5, 1974). The opinion in *James et al., vs. Pinnix et al.,* No. 73-186, is reported at 495 F.2d 206 (5th Cir. June 10, 1974)

JURISDICTION

The petitioners seek to invoke this Court's jurisdiction under 28 U. S. C. §1254 (1). Respondent, Union Bank and Trust Company, respectfully submits that review on Writ of Certiorari is not a matter of right and upon close examination the petitioners have failed to meet the test set forth in Supreme Court Rule 19.

QUESTION PRESENTED

Does the enactment of Title 7A, Code of Alabama, §§ 9-503 and 9-504, which merely permits private, peaceful self-help repossession by a creditor from a defaulting purchaser, *significantly* involve the State of Alabama to amount to "state action" or action "under color of" state law to confer jurisdiction of the federal district court under 42 U. S. C. §1983, where the repossession took place after default on a private contract providing for peaceful repossession in case of default?

STATUTES INVOLVED

Revised Stat. Sec. 1979, 42 U. S. C. §1983, and Code of Alabama 1940 (Recomp. 1958) Title 7A §§ 9-503 and 9-504 are pertinent to the question presented and are adequately set forth in the Appendix to the petitioner's brief.

STATEMENT OF THE CASE

This litigation involves a suit by Jerry D. Brantley and Jean A Brantley (hereinafter referred to as the "Brantleys") against Union Bank & Trust Company, a corporation, and its employees (hereinafter collectively referred to for purposes of this litigation as the "Bank"), seeking to have Title 7A §§ 9-503

and 9-504 of the Code of Alabama declared unconstitutional because these sections *permit* limited peaceful self-help repossession without prior notice or hearing. The Brantleys allege a violation of the Fourteenth Amendment and claim jurisdiction in the federal district court by virtue of 42 U. S. C. 1983.

The facts, for purposes of this litigation, come entirely from Section V of the Brantleys' complaint. No testimony was taken. Briefly, the Brantleys allege that on April 11, 1972, they purchased from Mary Chevrolet Company in Troy, Alabama, a 1970 Pontiac automobile for $4,134.57. In order to finance the purchase, they signed a Retail Installment Contract (copy of which is attached to the complaint marked "Exhibit 2") promising to pay the aforesaid sum. The installment contract permitted the Bank to peacefully repossess the automobile in the event the Brantleys defaulted in payment for same.

Mary Chevrolet transferred this installment contract to the Bank and the Brantleys began paying the Bank on May 26, 1972, with monthly installments due on the 26th of each succeeding month for a total of 36 months. They made timely payments for May and June, but defaulted thereafter paying the July installment in August, the August installment in October, and the September installment in November. The automobile was repossessed by a private individual employed by the Bank, who acted without court process or aid of any state official. At the time of repossession the Brantleys were two months in default. The repossession was accomplished without force or breach of the peace. The Brantleys admit that they agreed, by contract, to surrender possession of the automobile in the event that they defaulted

(paragraph three of the Retail Installment Contract made an exhibit to the complaint).

The Bank filed a Motion to Dismiss[1] asserting as grounds therefor that the facts alleged by the Brantleys in their complaint affirmatively establish that they have not stated a claim against the Bank for which relief can be granted under 42 U. S. C. 1983, and its jurisdictional counterpart, 28 U. S. C. 1343, and that the complaint affirmatively demonstrates that the repossession was both private and peaceful and was not accomplished "under color of" state law.

The District Court decided the case on the pleadings and written briefs without any testimony, and dismissed the action for lack of federal jurisdiction, finding no "state action" within the meaning of §1983. An appeal was taken from the order of dismissal.

The *Brantley* and *Baker* cases were consolidated for purposes of appeal by the Court of Appeals for the Fifth Circuit. Briefs were filed and the Court postponed disposition of the appeal pending its decision in *James vs. Pinnix,* 495 F.2d 206 (1974). On August 5, 1974, the Court affirmed the judgment of the District Court dismissing the complaints in *Brantley* and *Baker,* holding that requisite state action was lacking.

---

[1]The Motion to Dismiss is appended he

ARGUMENT

I.

THE DECISION BELOW IS CLEARLY CORRECT

Title 42 U. S. C. §1983 expressly requires state action not only for the purpose of jurisdiction but also to state a claim for redress under the Fourteenth Amendment to the Constitution. The due process clause of the Fourteenth Amendment provides:

> ". . . [N] or shall any state deprive any person of life, liberty, or property, without due process of law."

The plain wording of §1983 and the due process clause make it clear that only *state* deprivation is prohibited: *Shelley vs Kraemer*, 334 U. S. 1 (1948). Therefore, state action is both jurisdictional under 1983 as well as essential to the due process violation. Moreover, the state must be significantly involved in the repossession *Moose Lodge No. 107 vs. Irvis*, 407 U. S. 163 (1972). Clearly if the state is not *significantly involved* for 1983 jurisdiction, there can be no due process violation.

The United States Supreme Court has made it abundantly clear that the mere existence of a state statute will not constitute state action unless the state statute significantly involves the state in the private action by creating the right to act or compelling or requiring the action.

In the case of *Moose Lodge No. 107 vs. Irvis*, 407 U. S. 163 (1972), decided subsequent to *Reitman vs. Mulkey*, 387 U. S. 369 (1967), the Court held that state action could not be based upon the per-

vasive state regulatory scheme which did not *significantly* implicate the state in the discriminatory practices and policies of the private party. In that case the plaintiff, who had been denied service of an alcoholic beverage while at the Lodge, argued that there was state action since the Lodge derived its authority to sell liquor solely from a license from the state and the state extensively regulated the activities of the Lodge.

The Court rejected this argument holding that where private conduct is challenged, state action will not be found unless the state has "significantly involved itself" with the challenged conduct, 407 U. S. at 177. The Court found no such state involvement, stating:

> "We therefore hold that, with the exception hereafter noted, the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge so as to make the latter 'State action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment."

In the instant litigation the creditors acted pursuant to private agreements with the debtors. Conditional sales agreements similar to ones used by the Bank were in existence long before Alabama enacted §§ 9-503 and 9-504. These sections do not create or change remedies traditionally available to secured creditors nor do they compel or require self-help repossession.

II

THERE IS NO CONFLICT OF DECISION AND THE QUESTION OF LAW IS SETTLED

Research has revealed that all federal appellant courts to meet the issue raised by the question presented have failed to find significant state action present.

Gibbs vs. Titelman, Nos. 74-1062 to 74-1067 (3rd Cir., filed August 1, 1974);
Nowlin vs. Professional Auto Sales, Inc., No. 73-1348 (8th Cir., filed April 25, 1974):
Shirley vs. State National Bank of Connecticut, No. 73-1783 (2d Cir., filed February 14, 1974):
Adams vs. Southern California First National Bank, 492 F.2d 324 (9th Circuit, 1973);
Bichel Optical Laboratories, Inc., vs. Marquette National Bank, 487 F.2d 902 (8th Cir., 1973);
Turner vs. Impala Motors. No. 73-1826 (6th Cir., Sept. 20, 1974).

There is, therefore, no conflict in the decisions for this Court to decide.

The various Circuits deciding the question presented are also uniform in distinguishing *Reitman vs. Mulkey*, on the basis that *Reitman* involves racial discrimination. Despite this distinction, it is clear that in each and every case the court found that the particular state was not *significantly* involved in self-help repossession merely by the enactment of §§ 9-503 and 9-504.

In the *Turner vs. Impala Motors*, No. 73-1826 (6th Circuit, Sept. 20, 1974), ...F.2d ....., it was stated:

"We are likewise persuaded that *Reitman* cannot be relied upon to justify a finding of state action here. Our opinion in *Palmer* notwithstanding, 479 F.2d 153 (6th Cir. 1973), we view *Reitman* as dealing with a state attempt to accomplish indirectly what it was prohibited from doing directly. We cannot ignore the fact that the context of onerous racial discrimination in which the case was set demanded special scrutiny. The injustices of racial discrimination cast a different shadow than that of the case now before us. See *Oller vs. Bank of America*, 342 F. Supp. 21, 23 (N. D. Cal. 1972)

* * *

"Appellant makes the principal point that the private activity before us should be viewed as encouraged by the statute and therefore a finding of state action is justified, While acknowledging that the point has a measure of merit, we do not find it persuasive.

"It is clear that in this case the state did not exert any control or compulsion over the creditor's decision to repossess. The private activity was not commanded by the simply permissive statute. While mere existence of the statute might seem to suggest encouragement, we conclude that the effect of the statute is only to reduce a creditor's risk in making repossessions. As a practical matter, a creditor's decision is more likely to be principally influenced by the economics of the situation than by the presence of a permissive statute.

"We fail to see where the creditor has sought to invoke any state machinery to its aid. Rather, the creditor has simply relied upon the terms of his

security agreement pursuant to the private right of contract. Compare *Shelley vs. Kraemer,* 334 U. S. 1 (1948). Assuming that the statute was nonexistent, the remedy of self-help repossession could still be utilized based on its common law heritage and the private right to contract. We fail to see how the creditor is attempting to enforce any right in reliance upon a constitutional or statutory provision as in *Reitman* or is even asserting any state-created right. Rather, we see a creditor privately effectuating a right which was created in advance by contract between the parties. At best the right is one that is merely codified, but not created, in the statute.

"Appellant also argues that the statute authorizes an individual to perform the governmental function of seizing private property. As stated previously, the statute merely codified and did not create any right or state power. Were we to rely upon the mere fact of codification, we would in part be making available to a complex matrix of human behavior, as regulated by statutes, the scope of federal remedies. We decline to establish that precedent, particularly under the circumstance of a statute that is permissive in nature."

The Fifth Circuit in *Brantley, Baker* and *Pinnix* likewise distinguished *Reitman vs. Mulkey,* and *Moose Lodge No. 107 vs. Irvis,* and stated that "some state involvement in the *Reitman-Moose Lodge* sense may be present here, but it is simply not enough . . ." The Fifth Circuit therefore found that there was no significant state involvement; stating that racial discrimination cases set the outer boundaries of "imputed" state action and that they were "unwilling to push

out the frontiers still farther". By these references the Court was not establishing a "double standard" as alleged by the petitioners. The Court merely noted that the United States Supreme Court has established what appears to be the outer limits of state action in decisions in racial discrimination cases.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES J. CARTER
JOHN M. MILLING, JR.
Second Floor, Hill Building
P. O. Box 116
Montgomery, Alabama

CHARLES P. MILLER
Union Bank Building
Montgomery, Alabama

Of Counsel:

JAMES J. CARTER
Second Floor, Hill Building
P. O. Box 116
Montgomery, Alabama

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

*

JERRY D. BRANTLEY AND
JEAN A. BRANTLEY, *
Plaintiffs
CIVIL ACTION
Vs. * NO. 4007-N

UNION BANK & TRUST COMPANY,
A CORPORATION; DOUG GOODWIN *
INDIVIDUALLY; AND LANGFORD
INVESTIGATORS, INC., A *
CORPORATION
Defendants *

MOTION TO DISMISS

Comes the defendant, Union Bank & Trust Company, a Corporation, and moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss the action on the grounds that the Court lacks jurisdiction because the facts alleged in the complaint affirmatively show that the alleged acts of the defendants were not "under color of" state law within the meaning and requirements of

42 U. S. C., Section 1983, and its jurisdictional counterpart, 28 U. S. C., Section 1343.

HILL, HILL, STOVALL, CARTER & FRANCO
s/ JOHN M. MILLING, JR.
Attorneys for the Defendant

MILLER & HOFFMAN
s/ CHARLIE MILLER
Attorneys for the Defendant

HILL, HILL, STOVALL, CARTER & FRANCO
P. O. Box 116
Montgomery, Alabama 36101
MILLER & HOFFMAN
P. O. Box 1516
Montgomery, Alabama 36102

NOV 4 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-393

JERRY D. BRANTLEY, ET AL,
Petitioners,

versus

UNION BANK & TRUST COMPANY, ET AL,
Respondents.

GRANT BAKER, CLINTON GRADY,
ESSIE LEE FELTON, ET AL,
Petitioners,

versus

R. FRANK KEEBLE, INDIVIDUALLY,
AND TOWN FINANCE CORPORATION,
Respondents.

BRIEF OF RESPONDENT TOWN FINANCE CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK M. GLEASON
102 HOWARD STREET
ROSSVILLE, GEORGIA 30741

(Telephone: 404-866-7977)

COUNSEL FOR RESPONDENT,
TOWN FINANCE CORPORATION

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-393

JERRY D. BRANTLEY, ET AL,
Petitioners,

versus

UNION BANK & TRUST COMPANY, ET AL,
Respondents.

GRANT BAKER, CLINTON GRADY,
ESSIE LEE FELTON, ET AL,
Petitioners,

versus

R. FRANK KEEBLE, INDIVIDUALLY,
AND TOWN FINANCE CORPORATION,
Respondents.

BRIEF OF RESPONDENT TOWN FINANCE CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

QUESTIONS PRESENTED

(1) Whether the maker of a security agreement obligation, in default on the payments, may, after the release of the security and the return of the property to the creditor, and the execution of a written release, maintain an action for damages on a claim that repossession under the Uniform Commercial Code was involved, and that such taking was state action.

The petition for certiorari against TOWN FINANCE CORPORATION (pp. 4, 5, 6) omits alleging the important fact that the maker of the security instrument released his interest in the vehicle, and voluntarily surrendered possession to the agent of TOWN FINANCE CORPORATION.

Part V of the Complaint (pp. 40(a) to 45(a)) alleges a repossession by TOWN FINANCE CORPORATION, pursuant to Title 7-A Section 9-503, Code of Alabama. This defendant's answer affirmatively alleged, in accordance with Rule 7(c), F.R.C.P., the execution and delivery of a release by plaintiff CLINTON GRADY to TOWN FINANCE CORPORATION, and alleges that CLINTON GRADY, the owner of such vehicle, voluntarily and of his own free will, because of his inability to repay the loan he had procured, surrendered possession of such vehicle to TOWN FINANCE CORPORATION and executed a written release for such vehicle, a copy of which is attached as "Exhibit A" - Appendix.

Respondent, therefore, contends that the question said to be presented by the petition is, in fact, unsupported by the record in the case.

Respondent alleges that even if the property had been taken in the manner alleged, under the provisions of the Uniform Commercial Code, mere private repossession does not constitute state action, and is authorized by both *Fuentes v. Shevin*, 407 U.S. 67 (1972) (page 1993, Note 12) and *Mitchell v. W. T. Grant and Co.*, 94 S.Ct. 1895 (1974).

The District Court had no jurisdiction in the first place in Baker's case, under Section 1983, because of the lack of requisite state action.

U.S. v. Price, 86 S.Ct. 1152 on p. 1166, 383 U.S. 787 (1966);
U.S. v. Classic, 61 S.Ct. 1031, 313 U.S. 299 (1941);
Screws v. U.S., 65 S.Ct. 1031, 325 U.S. 91 (1945).

CONCLUSION

We respectfully submit that no legal reason exists for the grant of a writ of certiorari, and that the application should be denied.

Respectfully submitted,

FRANK M. GLEASON

ATTORNEY FOR RESPONDENT TOWN FINANCE CORPORATION

FRANK M. GLEASON
ATTORNEY AT LAW
102 HOWARD STREET
ROSSVILLE, GEORGIA 30741

Telephone (404) 866-7977

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Respondent were on the ____ day of November, 1974, mailed to:

MR. CLEVELAND THORNTON
411 East Northside
Tuskegee, Alabama 36083

MR. JOHN B. CRAWLEY
1018 South B
Troy, Alabama 36081

MR. JOSEPH J. LEVIN, JR.
MS. PAMELA S. HOROWITZ
MR. MORRIS S. DEEX, JR.
119 S. McConough Street
Montgomery, Alabama 36101

Attorneys for Petitioners, GRANT BAKER, CLINTON GRADY, ESSIE LEE FELTON, ET AL.

FRANK M. GLEASON

APPENDIX

Defendant, TOWN FINANCE CORPORATION, * * * "denies the allegations contained in sub-paragraph (a) of Paragraph V which alleges that "Plaintiffs went to West Point, Georgia to borrow money from defendant Town Finance Corporation in order to purchase one 1970 Chevelle automobile, Serial Number 136370A172157" (the only plaintiff applying for such loan being CLINTON GRADY), so much of the allegations appearing in sub-paragraph (d) of Paragraph V of the complaint as allege "However at the instruction of defendant Town Finance Corporation she signed as 'Essie Lee Grady' ", the last sentence of sub-paragraph (e) of Paragraph V, the second sentence of sub-paragraph (k) of Paragraph V, the allegations contained in sub-paragraph (m) of Paragraph V of the complaint which allege that JONES came to the residence of the plaintiff and "took possession and repossessed" said automobile (the facts being that on the evening of February 20th, plaintiff CLINTON GRADY accompanied JONES to the residence of GRANT BAKER, who then turned possession of the Chevelle automobile over to CLINTON GRADY, and GRADY then drove the automobile away from the BAKER house to a community called Society Hill, where GRADY voluntarily released such automobile to JONES and executed his written release to such vehicle), sub-paragraph (n) of Paragraph V, sub-paragraph (o) of Paragraph V, sub-paragraph (p) of Paragraph V."

COPY OF RELEASE

2/17/73

I agree to release one 1970 Chevrolet Serial # 136370A172157 to Town Finance Corporation.

/s/ CLINTON GRADY